Mohd Latiff bin Shah Mohd & Ors v Tengku Abdullah ibni Sultan Abu Bakar & Ors and other actions

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C 22-204-86 CONSOLIDATED WITH CIVIL SUITS NO F 23-96-86 AND C 23-1084-86
ZAKARIA YATIM J
6 FEBRUARY 1995

Civil Procedure *— Representative action — Club members — Plaintiffs not public officers of club — Whether plaintiffs competent to bring action — Rights of plaintiffs as members of club affected — Whether plaintiffs could bring action in individual capacity as members — Societies Act 1966 s 9(c) — Rules of the High Court 1980 O 15 r 12*

Unincorporated Associations *— Societies — Membership — Club in the process of being set up — Temporary licence granted by Registrar of Societies — Defendants admitted to membership by protem committee — Whether defendants were full members of club*

Unincorporated Associations *— Club — Fiduciary duty — Whether duty exists between promoters of club and club or members of club — Whether fiduciary duty exists only in relation to companies — Whether duty breached — Whether cause of action accrued only to persons who were members at time of the breach — Whether promoters failed to exercise due care, skill and diligence*

Unincorporated Associations *— Promoters — Who were promoters — Test to be applied*

Contract *— Undue influence — Fiduciary relationship — Whether parties standing in fudiciary relationship — Promoters of club sold their own shares to the club — Presumption of undue influence — Whether there was independent advice — Contracts Act 1950 s 16(1) & (2)*

This action concerned three civil suits, civil suit No 204 of 1986 ('the first suit'), civil suit No 96 of 1986 ('the second suit') and civil suit No 1084 of 1986 ('the third suit'), which have been consolidated. At the trial, however, the second suit was not proceeded with. In the third suit, Allied Capital, a private limited company incorporated in Malaysia, brought an action against the secretary of the Raintree Club ('the Club') as the registered officer of the Club. It was alleged that by a written agreement dated 24 August 1982 ('the agreement') entered into between Allied Capital on one part, and Tengku Abdullah and Gen Yusoff, both acting for and on behalf of the Club on the other part, it was agreed that the plaintiff would sell to the Club shares in Raintree Development for the sum of RM47m. Allied Capital alleged that the Club failed to pay the remaining sum of RM8,408,997. While admitting the purchase of the shares for RM47m, the defendant contended that the Club had been induced into the agreement under the undue influence of Allied Capital. The defendant stated, inter alia, that at all material times, Tengku Abdullah

and Gen Yusoff were the major shareholders of Allied Capital and Raintree Development. The defendant counterclaimed and contended that the true value of the shares was only RM24,597,162 and that the defendant was entitled to counterclaim the sum of RM16,571,734 being the difference between the amount paid and the actual value of the shares. A B

The plaintiffs in the first suit were suing on behalf of themselves and all other members of the Club except the defendants, arising from the said agreement. The plaintiffs' claim against the first to the fourth defendants (which included Tengku Abdullah and Gen Yusoff) was for damages for breach of fiduciary duty as promoters of the Club while the claim against all nine defendants was for damages for their breach of duty to exercise due care, skill and diligence. The defendants, however, argued that the plaintiffs were incompetent in law to bring a representative action within the meaning of O 15 r 12 of the Rules of the High Court 1980 ('the RHC'), as the plaintiffs were not members of the Club as at 24 August 1982, when the cause of action was alleged to have accrued. It was also said that the plaintiffs were not and had never been the public officers of the Club within the meaning of s 9(c) of the Societies Act 1966. The defendants also submitted that any cause of action based on breach of fiduciary duty did not accrue to the plaintiffs as they were not members of the Club at the material time. In any case, they argued that promoters of a Club have no fiduciary relationship with the members of the Club they sought to promote. The key issues which arose were: (i) whether the first suit was properly brought before the court; (ii) the membership of the Club at the relevant time; (iii) whether the defendants in the first suit were promoters of the Club and owed a fiduciary duty to the Club; (iv) whether there was a breach of the fiduciary duty, if any, owed by the defendants to the Club; and (v) whether the Club was induced to enter into the agreement under the undue influence of Allied Capital. C D E F

Held, allowing the plaintiffs' claim in the first suit but dismissing Allied Capital's claim and allowing the defendant's counterclaim in the third suit: G

(1) It was not disputed that the Club did not have a public officer at the material time. However, a person may commence a legal action in the capacity of his individual right as a member of a society. As such, the plaintiffs in the first suit were competent to bring the suit in a representative capacity even though none of them was a public officer of the Club. H

(2) It could not be said that when the agreement was executed, the defendants were the only members of the Club, whereas none of the plaintiffs was then a member and thus not competent to bring the first suit. On the available documentary evidence which must prevail, the Club was only registered under the Societies Act 1966 on 20 January 1983, and thus, the defendants could I

not have become full members of the Club as at 24 August 1982, when the agreement was executed.

(3) A fiduciary relationship exists not only in relation to a company but also between two persons, such as when one person entrusted to another the negotiation of a contract on his behalf or for his benefit and relied on the other to procure for him the best terms available. In the circumstances, there was a fiduciary relationship between the promoters of the Club and the Club and/or the members of the club.

(4) The question whether a person was or was not a promoter was one of fact to be decided by the court. All the nine defendants in the first suit were the promoters of the Club, as they were the members of the protem committee who were appointed to take the necessary steps to obtain the registration of the Club. They were thus in fiduciary relationship with the Club.

(5) The first to fourth defendants in the first suit were in effect the vendors as well as the purchasers of the shares of Raintree Development, and also the promoters of the Club. Although they had declared their interest in Allied Capital, they, as promoters of the Club, could not run away from their fiduciary duty to the Club. In the circumstances of the case, each of the defendants had an interest either as shareholder, director or employee of the companies owned by Tengku Abdullah and Gen Yusoff, or the Ayala Group with which Tengku Abdullah and Gen Yusoff worked closely in mooting the idea of the Club. When the protem committee resolved to purchase the shares in Raintree Development for RM47m, all the defendants were not in a position to act impartially. There was no independent and intelligent judgment on the transaction to purchase the shares. The promoters were biased and nothing was done to protect the interests of the Club. On the relevant evidence adduced in the first suit, the defendants had been in breach of their fiduciary duty to the Club.

(6) Since there had been a breach of the fiduciary relationship between the defendants and the Club, the rights of the members of the club were affected. All the members of the Club, including present members were liable to pay the purchase price of the shares. The plaintiffs were thus entitled to bring a representative action under O 15 r 12 of the RHC. All the persons who were represented by the plaintiffs have the same common interest in bringing the action.

(7) The defendants in the first suit, as promoters of the Club, had failed to exercise due care, skill and diligence in the exercise of their duty in promoting the Club. They failed to get independent advice on the value of the shares and were only concerned in promoting their own interest.

(8) A contract is said to be induced by undue influence where the relations subsisting between the parties were such that one of the parties was in a position to dominate the will of the other, and used that position to obtain an unfair advantage over the other. Where one party stood in a fiduciary relation to the other, that party was deemed to be in a position to dominate the will of the other. In this case, the plaintiff in the third suit was deemed to have exercised undue influence over the Club in the execution of the agreement.

(9) The value of the shares as at 24 August 1982 was RM25,718,000. As the Club had paid RM41,168,876, judgment should be entered on the defendant's counterclaim for the difference of RM15,450,876 to be refunded.

[Bahasa Malaysia summary

Tindakan ini adalah berkenaan dengan tiga guaman sivil, guaman sivil No 204 tahun 1986 ('guaman pertama'), guaman sivil No 96 tahun 1986 ('guaman kedua') dan guaman sivil No 1084 tahun 1986 ('guaman ketiga'), yang telah pun disatukan. Walau bagaimanapun, guaman kedua telah tidak diteruskan di perbicaraan. Di dalam guaman ketiga, Allied Capital, sebuah syarikat sendirian berhad yang diperbadankan di Malaysia, telah membawa satu tindakan terhadap setiausaha Kelab Raintree ('Kelab itu') sebagai pegawai berdaftar Kelab itu. Adalah dikatakan bahawa melalui satu perjanjian bertulis bertarikh 24 Ogos 1982 ('perjanjian itu') yang telah diikat di antara Allied Capital pada satu pihak, dengan Tengku Abdullah dan Jen Yusoff, kedua-duanya bertindak untuk dan bagi pihak Kelab itu pada belah yang lain, telah dipersetujui bahawa plaintif akan menjual kepada Kelab itu saham-saham Raintree Development untuk wang sejumlah RM47 juta. Allied Capital mengata bahawa Kelab itu gagal membayar baki wang berjumlah RM8,408,997. Walaupun defendan mengakui pembelian saham-saham itu untuk RM47 juta, defendan menegaskan bahawa Kelab itu telah didorong untuk mengikat perjanjian itu di bawah pengaruh tidak wajar plaintif. Defendan menyatakan, antara lain, bahawa pada semua masa yang material, Tengku Abdullah dan Jen Yusoff adalah pemegang saham utama Allied Capital dan Raintree Development. Defendan telah menuntut balas dan mengatakan bahawa nilai sebenar saham-saham itu hanya RM24,597,162, dan oleh yang demikian defendan berhak menuntut balas jumlah RM16,571,734 yang merupakan perbezaan di antara jumlah yang telah dibayar dan nilai sebenar saham itu.

Dalam guaman pertama pula, plaintif membawa tindakan bagi pihak mereka sendiri dan juga semua ahli-ahli lain Kelab itu kecuali defendan-defendan, berdasarkan perjanjian itu. Tuntutan plaintif terhadap defendan pertama hingga keempat (termasuk Tengku Abdullah dan Jen Yusoff) adalah untuk ganti rugi atas kemungkiran kewajipan fidusiari mereka sebagai penganjur Kelab itu, sementara

A tuntutan terhadap kesemua sembilan defendan adalah untuk ganti rugi untuk kemungkiran kewajipan menggunakan ketelitian, kemahiran dan ketekunan yang berpatutan. Defendan sebaliknya, berhujah bahawa plaintif tidak kompeten di sisi undang-undang untuk membawa satu tindakan perwakilan mengikut makna A 15 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), kerana B plaintif bukanlah ahli-ahli Kelab itu pada 24 Ogos 1982, bilamana kausa tindakan itu dikatakan telah terakru. Juga dikatakan bahawa plaintif bukan dan tidak pernah menjadi pegawai awam kelab itu mengikut makna s 9(c) Akta Pertubuhan 1966. Defendan juga berhujah bahawa sebarang kausa tindakan yang berdasarkan C kemungkiran kewajipan fidusiari tidak terakru kepada plaintif kerana mereka bukan ahli-ahli kelab itu pada masa yang material. Walau apa sekalipun, mereka berhujah bahawa penganjur sesebuah Kelab tidak mempunyai apa-apa hubungan fidusiari dengan ahli-ahli Kelab yang dianjurkan olehnya. Isu-isu utama yang timbul ialah: (i) sama ada guaman pertama telah dibawa melalui cara yang betul ke mahkamah; D (ii) keahlian Kelab itu pada masa yang relevan; (iii) sama ada defendan-defendan dalam guaman pertama adalah penganjur Kelab itu, dan sama ada mereka berkewajipan fidusiari terhadap Kelab itu; (iv) jika didapati bahawa defendan berkewajipan fidusiari terhadap Kelab itu, sama ada terdapat kemungkiran kewajipan fidusiari tersebut; E dan (v) sama ada Kelab itu telah didorong untuk megikat perjanjian itu di bawah pengaruh tidak wajar Allied Capital.

Diputuskan, membenarkan tuntuan plaintif dalam guaman pertama tetapi menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dalam guaman ketiga:

F (1) Adalah tidak dipertikaikan bahawa Kelab itu tidak mempunyai seorang pegawai awam pada masa yang material. Walau bagaimanapun, seseorang boleh memulakan satu tindakan undang-undang dalam keupayaan hak individunya sebagai seorang ahli sesebuah pertubuhan. Oleh itu, plaintif di dalam guaman G pertama adalah kompeten untuk membawa tindakan itu dalam keupayaan perwakilan mereka walaupun mereka bukanlah pegawai awam Kelab itu.

(2) Adalah tidak betul untuk mengatakan bahawa apabila perjanjian itu diikat, defendan merupakan ahli-ahli tunggal Kelab itu H manakala tidak seorangpun daripada plaintif adalah ahli pada masa itu dan akibatnya, tidak kompeten untuk membawat guaman pertama itu. Mengikut keterangan dokumentar yang ada yang mesti diikuti, Kelab itu cuma didaftarkan di bawah Akta Pertubuhan 1966 pada 20 Januari 1983, dan lantaran itu, defendan tidak mungkin menjadi ahli penuh Kelab itu pada I 24 Ogos 1982 apabila perjanjian itu telah diikat.

(3) Suatu hubungan fidusiari wujud bukan hanya berkenaan dengan sesebuah syarikat tetapi juga boleh wujud di antara dua orang, misalnya apabila seorang memberi amanah pada seorang yang

lain untuk merundingkan sesebuah kontrak bagi pihaknya atau bagi faedahnya, dan bergantung kepada orang itu untuk mendapatkan baginya terma terbaik yang boleh didapati. Dalam keadaan kes ini, terdapat hubungan fidusiari di antara penganjur kelab itu dengan Kelab itu dan/atau ahli-ahli Kelab itu.

(4) Persoalan sama ada seseorang itu merupakan seorang penganjur atau tidak adalah satu soalan fakta yang mesti diputuskan oleh mahkamah. Kesemua sembilan orang defendan dalam guaman pertama adalah penganjur Kelab itu kerana mereka adalah ahli-ahli jawatankuasa protem yang dilantik untuk mengambil langkah-langkah yang perlu untuk mendaftarkan Kelab itu. Dengan itu, mereka berada di dalam hubungan fidusiari dengan Kelab itu.

(5) Defendan pertama hingga keempat dalam guaman pertama pada hakikatnya, adalah penjual serta pembeli saham Raintree Development, dan juga penganjur Kelab itu. Walaupun mereka telah mendedahkan kepentingan mereka dalam Allied Capital, mereka sebagai penganjur, tidak boleh mengelakkan diri daripada kewajipan fidusiari mereka terhadap Kelab itu. Mengikut keadaan kes ini, setiap defendan mempunyai kepentingan sama ada sebagai pemegang saham, pengarah atau kakitangan syarikat-syarikat kepunyaan Tengku Abdullah dan Jen Yusoff ataupun Kumpulan Ayala, yang telah bekerja rapat dengan Tengku Abdullah dan Jen Yusoff dalam membangkitkan idea Kelab itu. Apabila jawatankuasa protem itu membuat resolusi untuk membeli saham Raintree Development untuk RM47 juta, kesemua defendan tidak berada dalam kedudukan untuk bertindak secara saksama. Tidak terdapat pendapat bebas dan bijak tentang transaksi untuk membeli saham itu. Penganjur itu bersifat berat sebelah dan tidak ada apa-apa yang dilakukan oleh mereka bagi tujuan mempertahankan kepentingan Kelab itu. Atas keterangan yang relevan yang telah dikemukakan dalam guaman pertama itu, defendan telah memungkiri kewajipan fidusiari mereka kepada Kelab itu.

(6) Akibat kemungkiran hubungan fidusiari antara defendan dengan Kelab itu, hak ahli-ahli Kelab itu telah terjejas. Kesemua ahli kelab itu, termasuk ahli-ahli semasa, mempunyai liabiliti untuk membayar harga pembelian saham itu. Lantaran itu, plaintif adalah berhak untuk membawa tindakan perwakilan di bawah A 15 k 12 KMT. Kesemua orang yang diwakili oleh plaintif mempunyai kepentingan bersama yang serupa dalam membawa tindakan itu.

(7) Defendan di dalam guaman pertama, sebagai penganjur Kelab itu, telah gagal menggunakan ketelitian, kemahiran dan ketekunan yang berpatutan dalam menjalankan kewajipan mereka untuk menganjur Kelab itu. Mereka telah gagal mendapatkan nasihat bebas tentang nilai saham itu, dan cuma memikirkan kepentingan mereka sendiri.

(8) Suatu kontrak dikatakan telah didorong oleh pengaruh tidak wajar apabila hubungan yang wujud di antara pihak-pihak adalah sedemikian sehingga satu daripada pihak-pihak itu berada dalam kedudukan yang dapat menguasai kebebasan bertindak pihak yang satu lagi, dan telah menggunakan kedudukan itu untuk mendapatkan keutamaan secara tidak adil terhadap pihak yang satu lagi itu. Apabila satu pihak berada di dalam hubungan fidusiari dengan pihak yang satu lagi, pihak itu dianggap berada di dalam kedudukan yang dapat menguasai kebebasan bertindak pihak yang satu lagi itu. Dalam kes ini, plaintif dalam guaman ketiga dianggap sebagai telah menggunakan pengaruh tidak wajar ke atas Kelab itu dalam pengikatan perjanjian itu.

(9) Nilai saham-saham itu pada 24 Ogos 1982 adalah RM25,718,000. Oleh kerana Kelab itu telah membayar sebanyak RM41,168,876, penghakiman patut dimasukkan untuk tuntutan balas defendan supaya jumlah bezanya sebanyak RM15,450,876 dipulangkan.]

[*Editorial Note*: The defendants in the first suit have appealed to the Court of Appeal vide Civil Appeal No W–02–109–95; the plaintiff in the third suit has appealed to the Court of Appeal vide Civil Appeal No W–02–107–95.]

Notes

For cases on undue influence in contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2281–2290.

For cases on membership of societies and clubs, see 12 *Mallal's Digest* (4th Ed) paras 1204–1208; [1992] Mallal's Digest 1724–1727; [1993] Mallal's Digest 1352–1356.

For cases on representative actions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2889–2890.

Cases referred to

Campbell v Thompson & Anor [1953] 1 QB 445; [1953] 1 All ER 831; [1953] 2 WLR 656 (distd)

Emma Silver Mining Co v Lewis (1879) 40 LTR 749 (refd)

Erlanger v New Sombrero Phosphate Co (1877) 5 Ch D 103; (1878) 3 App Cas 1218 (HL) (folld)

Grace Shipping v Sharp & Co [1987] 1 MLJ 257 (folld)

Karting Club of Singapore, The v David Mak & Ors [1985] 2 MLJ 280 (distd)

Lloyds Bank v Bundy [1975] 1 QB 326; [1974] 3 All ER 757; [1974] 3 WLR 501 (folld)

Mahesan v Malaysian Government [1975] 1 MLJ 77; [1978] 1 MLJ 149 (refd)

National Assistance Board v Wilkinson [1952] 2 QB 648; [1952] 2 All ER 255 (refd)

National Westminster Bank v Morgan [1985] 1 All ER 821; [1985] 2 WLR 588 (refd)

Ong Boon Seong v Syed Hussein Alatas [1971] 2 MLJ 218 (folld)
Roche v Sherrington & Ors [1982] 2 All ER 426; [1982] 1 WLR 599 (folld)
Swain & Anor v Law Society [1981] 3 All ER 797; [1982] 1 WLR 17 (folld)
Tate v Williamson (1866) 2 Ch App 55 (folld)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (folld)
Whaley Bridge Printing Co v Green and Smith (1879) 5 QBD 109 (refd)

Legislation referred to

Contracts Act 1950 s 16(1), (2)
Societies Act 1966 ss 2, 9(c)
Rules of the High Court 1980 O 15 r 12

Raja Aziz Addruse (*Benjamin Yean* with him) (*Liza Chan & Co*) for the plaintiffs in civil suit No C 22–204–86 and for the defendant in civil suits No F 23–96–86 and C 23–1084–86.

Cecil Abraham (*R Nathan* with him) (*Shearn Delamore & Co*) for the defendants in civil suit No C 22–204–86 and for the defendant by counterclaim in civil suit No F 23–96–86.

K Anantham (*J Yee* with him) (*Skrine & Co*) for the plaintiff in civil suits No F 23–96–86 and C 23–1084–86.

Cur Adv Vult

Zakaria Yatim J: These three civil suits have been consolidated as one action with the consent of the parties concerned.

In civil suit No 96 of 1986, the plaintiff, Allied Capital Sdn Bhd ('Allied Capital'), is a private limited company incorporated in Malaysia. The defendant, Raintree Development Bhd ('Raintree Development') is also a private limited company incorporated in Malaysia. The plaintiff's claim against the defendant as contained in the amended statement of claim is for the sum of RM16,283,411.58, being the amount due to the plaintiff for the construction of the Raintree Club ('the Club') including professional fees and other expenses pursuant to an agreement dated 9 May 1981, and a subsequent agreement entered into between the parties. The defendant, in its amended statement of defence and amended counterclaim, alleges that the agreement dated 9 May 1981 was signed under the undue influence of the plaintiff. The defendant says that at all material times, all the directors of the plaintiff were also the directors of the defendant. The defendant contends that the directors had acted in excess of their authority. The defendant also contends that the said agreement was entered into through bribery of the defendant's directors. According to the defendant, the agreement was entered into on behalf of the defendant by its directors, namely, Tengku Abdullah ibni Almarhum Sultan Abu Bakar ('Tengku Abdullah'), Gen Yusoff bin Abu Bakar ('Gen Yusoff'), Jose R Reyes ('Jose') and Ramon G Madrid ('Ramon'), in

collusion with Allied Capital and in breach of their fiduciary duty to the defendant.

In civil suit No 1084 of 1986, the action is brought by Allied Capital against the secretary of the Club. He is sued as the registered officer of the Club. In the statement of claim, the plaintiff states that by a written agreement dated 24 August 1982, entered into between the plaintiff of one part and Tengku Abdullah and Gen Yusoff, both acting for and on behalf of the Club of the other part, it was agreed that the plaintiff would sell to the Club 1,540 Class A shares and 660 Class B shares of RM10,000 each in Raintree Development for the sum of RM47m. It is alleged that the Club, in breach of cl 3(A) of Sch C to the said agreement, failed to pay the remaining sum of RM8,408,997. The plaintiff's claim is for the said sum together with interest and for damages and costs. The defendant does not dispute that the Club purchased the said shares from the plaintiff for the sum of RM47m, but avers that the Club was induced to enter into the said agreement under the undue influence of the plaintiff. The defendant states, inter alia, that at all material times, Tengku Abdullah and Gen Yusoff were the major shareholders of Allied Capital and Raintree Development. The defendant counterclaims and contends that the true value of the said shares is RM24,597,162 and the defendant is entitled to counterclaim the sum of RM16,571,734, being the difference between the moneys which have been paid to the plaintiff and the actual value of the shares purchased. The plaintiff, in its reply and defence to the counterclaim, denies that it had induced the Club to enter into the said agreement through undue influence. There is also a counterclaim to the defendant's counterclaim. In the plaintiff's counterclaim, the plaintiff asks for a declaration that the agreement dated 24 August 1982 is void and unenforceable. In the alternative, the plaintiff asks the court to restore the parties to their original position.

In civil suit No 204 of 1986, the plaintiffs are suing on behalf of themselves and all other members of the Club except the defendants. The defendants are Tengku Abdullah, Gen Yusoff and seven others. The plaintiff's claim against the first, second, third and fourth defendants is for damages for breach of fiduciary duty. The claim against all the defendants is for damages for their breach of duty to exercise due care, skill and diligence. In the statement of claim, the plaintiffs state that the establishment of the Club called for the acquisition of all the issued and paid-up capital of Raintree Development. At all material times, the issued and paid-up shares of Raintree Development were held by Allied Capital. The first and second defendants were the major shareholders of Allied Capital. At all material times, the first, second, and fourth defendants were directors of Allied Capital, Raintree Development and another Malaysian incorporated company known as AF Holdings Sdn Bhd. The defendants in their reamended statement of defence aver that the plaintiffs are incompetent in law to bring a representative action within the meaning of O 15 r 12 of the Rules of the High Court 1980 ('the RHC'), as the plaintiffs were not members of the Club as at 24 August 1982, when the said cause of action, if any, accrued. Alternatively, the plaintiffs or any one of them is/are not

and/or have never been public officers within the meaning of s 9(c) of the Societies Act 1966 ('the Act'). The defendants contend that when the agreement dated 24 August 1982 was entered into, the only members of the Club were Tengku Abdullah, Gen Yusoff, John Low Nyap Heng, Yeoh Chong Swee, Leonard Tham, Tengku Azlan, Abdul Kadir Kassim, Clifford Tan, Lt Col Zarazillah, Junaidah Mohd Said and Angelina Low, and therefore, any cause or action based on breach of fiduciary duty or breach of duty to exercise due care and diligence accrued only to the eleven persons. The defendants deny that they were in breach of their fiduciary duty or negligent in agreeing to purchase the shares in Raintree Development for RM47m. The defendants further contend that those who became members of the Club after 24 August 1982 knew or ought to have known the costs involved in establishing the Club, and therefore they are estopped from denying the validity of the said agreement.

At the trial, civil suit No 96 of 1986 was not proceeded with. I shall therefore confine my judgment to civil suit No 1084 of 1986 and civil suit No 204 of 1986. I shall deal with civil suit No 204 of 1986 first.

It is not in dispute that at the time the suit was filed, the Raintree Club was registered under the Act. It is contended by Mr Cecil Abraham, counsel for the defendants, that neither of the plaintiffs is a public officer within the meaning of the Act, and therefore they are not entitled to commence the action. According to him, under the Act, a society can only sue in the name of its public officer. Raja Aziz, counsel for the plaintiffs, on the other hand, submits that the plaintiffs are proceeding with the suit by way of representative action pursuant to O 15 r 12 .

The first point for the court to consider is whether civil suit No 204 of 1986 is properly before the court. Section 9(c) of the Act provides:

> ... a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society; ...

Under s 2, the word 'societies' includes a club such as the Club.

Raja Aziz submits that s 9(c) does not remove the right of members of a club to institute action individually or collectively by way of representative action. He says that the section does not contain a mandatory requirement. In any event, at the material time, the Club did not have a public officer. This point is not disputed. He contends that the section cannot take away the fundamental right of individual members of a society to sue as plaintiffs in relation to legal wrongs done to them. He then cites *National Assistance Board v Wilkinson* [1952] 2 QB 648; [1952] 2 All ER 255. In that case, Devlin J in his judgment ([1952] 2 QB 648 at p 661; [1952] 2 All ER 255 at p 260) said, 'It is well established priciples of construction that a statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion'.

Mr Cecil Abraham on the other hand, cites *Campbell v Thompson & Anor* [1953] 1 QB 445; [1953] 1 All ER 831; [1953] 2 WLR 656; *The Karting Club of Singapore v David Mak & Ors* [1985] 2 MLJ 280; and *Ong Boon Seong v Syed Hussein Alatas* [1971] 2 MLJ 218.

In *Campbell v Thompson & Anor,* Pilcher J decided ([1953] 1 QB 445):

> ... as all the members of the club had, both as employers and as technical occupiers of the club premises, the same common interest in resisting the plaintiff's claim, and as the two defendants were persons who could fairly be taken as representing the body of the club members, a representation order might be made. The only members, however, who could properly be sued in the proceedings were those persons who were members of the club at the time of the plaintiff's fall, and the order to be made must, therefore, be restricted to such persons.

That case dealt with the question whether members of a society at the time liability incurred would be liable. In that case, the plaintiff was an employee of the Club. The court allowed the two defendants to represent the Club in that action. In *The Karting Club of Singapore,* Chua J decided that an unincorporated member club, not being a partnership or legal entity, can sue or be sued in the name of the club. It is to be noted that in that case, the suit was filed by the club itself. In *Ong Boon Seong v Syed Hussein Alatas,* Abdul Hamid J (as he then was), said at [1971] 2 MLJ 218 at p 221:

> It is argued that the plaintiff has no right to start this action for and on behalf of the society as he is not a registered public officer. Mr Ng Ek Teong counsel for the plaintiff submitted that the plaintiff is suing in his own name and he has properly instituted this legal action on the grounds, first, as a member, he instituted this legal action in the capacity of his individual right as a member. Secondly, he sues in his own right as a person who has been appointed secretary-general; and thirdly, he sues in the representative capacity authorized by the central committee. To my mind, it cannot be denied that as a member of the party, the plaintiff has the right to sue. Whilst it may be true that he sued in his own name, the fact remains that at all material times, he was holding the office of deputy secretary-general and a member of the central committee. In my opinion, the plaintiff is competent to institute these proceedings.

It is clear from the passage in the judgment of Abdul Hamid J quoted above that the plaintiff in that case was held competent to institute the proceeding even though he was not a registered public officer.

After considering the authorities cited above, I am satisfied that the plaintiffs in civil suit No 204 of 1986 are competent to bring this suit in representative capacity even though none of them is a public officer of the Club.

It is the defendants' case that as at 24 August 1982, when the sale and purchase agreement for the acquisition of the shares was executed, the defendants were the only members of the Club and accordingly, none of the plaintiffs is competent to bring the action against the defendants in respect of the purchase of the said shares. Raja Aziz, however, submits that as at 24 August 1982 when the sale and purchase agreement was entered

into, the defendants were not yet full members of the Club because the Club had not been registered under the Act. He says that the defendants were only provisional members at that time.

It is now necessary to examine whether as at 24 August 1982, the defendants were the only members of the Club. The meeting to form the Raintree Club was held on 20 October 1981 (AB2 at p 1). Twelve persons were present at the meeting, including all the nine defendants. At the meeting, a protem committee was appointed to take the necessary steps to obtain registration of the Club. On 7 January 1982, the protem committee was informed that an application for a temporary licence had been submitted to the registrar of societies. In a letter dated 23 February 1982 (AB1 at p 1), the registrar of societies granted a temporary licence subject to three conditions.

The letter states:

Kebenaran bergerak sementara

Setiausaha
The Raintree Club of Kuala Lumpur
7th Floor, MUI Plaza
Jalan Parry,
Kuala Lumpur.

Tuan

The Raintree Club of Kuala Lumpur

Adalah saya dengan hormatnya merujuk kepada permohonan tuan untuk mendaftarkan pertubuhan yang tersebut di atas dan memaklumkan bahawa sebelum didaftarkan pertubuhan tuan dibenarkan bergerak sementara dengan berdasarkan rang undang-undang yang telah dihantarkan ke Jabatan ini serta tertakluk kepada syarat-syarat yang berikut:

(i) pertubuhan ini tidak boleh bergabung atau mempunyai hubungan di luar Persekutuan;

(ii) kebenaran ini hanya berkuatkuasa sehingga satu-satu keputusan diambil oleh pendaftar ke atas permohonan pendaftaran pertubuhan tuan; dan

(iii) kebenaran ini boleh ditarik balik pada bila-bila masa yang difikirkan perlu oleh pendaftar.

Saya yang menurut perintah
—Sgd—
(Ahmad Kamal bin Mohd Sahaja)
Pendaftar Pertubuhan
Malaysia

The Club was only registered under the Act on 20 January 1983. The certificate of registration states:

Perakuan pendaftaran

Adalah dengan ini diperakui bahawa Kelab Raintree Kuala Lumpur (The Raintree Club of Kuala Lumpur), 7th Floor, MUI Plaza, Jalan Parry, Kuala Lumpur, telah pada hari ini didaftarkan sebagai suatu pertubuhan di bawah

A s 7 dalam Akta Pertubuhan 1966, dan bahawa nombor pendaftarannya ialah 3301 (Selangor).

Diperbuat dengan ditandatangani oleh saya pada 20 Januari 1983.

—Sgd—
(Zakiah bte Hashim)
B Pendaftar Pertubuhan
Malaysia.

After the temporary licence was granted and before the certificate of registration was issued, a general committee was appointed by the protem committee. At its meeting held on 24 February 1982, the protem committee C passed a resolution admitting the 11 persons, including the nine defendants to membership of the Club. The resolution is reproduced below:

Reference was made to the inaugural meeting held on 20 October 1981 and it was resolved:

That the following persons who were present at the inaugural meeting and D have indicated the desire for admission to membership in the Club be and are hereby admitted to membership in the Club subject to their completion of their respective application forms and the payment of the entrance fee.

Initial members

YM Tengku Abdullah ibni Almarhum Sultan Abu Bakar
E YM Tengku Azlan ibni Almarhum Sultan Abu Bakar (representing Tadco Sdn Bhd)
Brig Gen Yusoff bin Abu Bakar
Lt Col Zarazilah bin Mohd Ali
Patrick Yeoh Chong Swee
John Low Nyap Heng
F Leonard Tham
Abd Kadir
Junaidah
Angeline Low
Clifford Tan

Under r 38 of the Club's constitutional rules, the general committee was G only established after the Club was registered.

Mr Cecil Abraham submits that all the defendants were full members of the Club as at 24 August 1982. But Raja Aziz pointed out that by a resolution dated 8 April 1982 (AB3 at pp 1 and P1a–q), the membership committee admitted the names listed in the schedule to the resolution as H provisional members. These names include the names of the nine defendants. Miss Jasmine Ng Yew Kan (DW2), who was then the membership coordinator, testified in court that the said names were typed in by mistake. Under cross-examination, the witness admitted that the mistakes were discovered only after the present suit was filed (see notes of evidence at p 255). Raja Aziz's comment on DW2's evidence is as follows: I 'It looks very strange that the mistakes were discovered only after the plaintiffs instituted the action against the defendants ...'. He submits, '... The defendants' evidence smacks of an afterthought designed conveniently to fit the defence ...'. He then cites *Tindok Besar Estate*

Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 and *Grace Shipping v Sharp & Co* [1987] 1 MLJ 257. According to those two cases, where there are contemporaneous documents, anything said very much later regarding the event must be tested against those documents which tend to reflect more accurately the actual event. I agree with Raja Aziz's submission. In my view, the documentary evidence must prevail. In any event, since the Club was registered only on 20 January 1983, the defendants could not have become full members of the Club as at 24 August 1982.

Since the defendants were not full members of the Club as at 24 August 1982, I do not think that *Campbell v Thompson & Ors* [1953] 1 QB 445; [1953] 1 All ER 831; [1953] 2 WLR 656, applies to the present case.

It is the contention of the plaintiffs that they are competent to sue the defendants in a representative capacity. It is also the contention of the plaintiffs that the defendants were the promoters of the Club and they were therefore in a fiduciary relationship with the Club.

I shall consider the second point first. In considering this point, it is necessary to ascertain who is the promoter of the Club. Raja Aziz relies heavily on the House of Lord's decision in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218. In that case, Erlanger and his syndicate were the promoters of a company.

I think it is relevant to consider who is the promoter of a company. In *Whaley Bridge Printing Co v Green and Smith* (1879) 5 QBD 109, Bowen J in his judgment at p 111 said:

> The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence.

The question whether a person is or is not a promoter is a question of fact depending upon what the so-called promoter really did and a judge in summing up to a jury is not bound to define the term: see 7 *Halsbury's Laws of England* (4th Ed) para 37. See also *Emma Silver Mining Co v Lewis* (1879) 40 LTR 749.

It is settled law that promoters of a company are in a fiduciary relationship with the company. In *Erlanger*, Lord Cairns LC in his speech said ((1878) 3 App Cas 1218 at p 1236):

> In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company, and *it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position.* They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion,

A incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, B and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person. (Emphasis added.)

C The facts of that case as stated in the headnote are as follows:

A 'syndicate' (or partnership) of persons, of which one E was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. E, who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. D Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for E; the other was a private friend of E. The sale of the island was made, nominally, by a person who had really no interest in the E island, and was made to the director who was the business agent of E, and who appeared as the purchaser for the company. The two directors, with whom, through E's arrangement, a third person, D (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued, giving a very favourable F account of the scheme. Many persons took shares. At the first meeting of shareholders, D took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, D avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed G to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February 1872. In June 1872, there was a general meeting of the shareholders. The rumors before referred to had become stronger, and a committee of investigation was appointed; on the receipt of whose report in August 1872, the original directors were, at a public meeting, removed, and a new set of directors appointed, with H power to take measures, etc, for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which terminated in nothing, and a bill was, in December 1872, filed to rescind the contract.

Lord Blackburn in his speech at pp 1267 and 1268 in that case, said:

I They farther said that when the vendors promoted and formed a company for the purpose of purchasing at that price, they were not entitled to treat that company as a stranger. *As promoters of a company they stood in a fiduciary position towards the company they were creating, and that the bargain between the promoters and that company could not stand unless more was done for the*

purpose of protecting the interest of that company than was done in this case. It seems to me that the 21st paragraph of the plaintiff's bill does sufficiently allege such a case; and the first question which I think has to be considered is whether enough is proved in fact, to make a case good in law under which, if the plaintiffs had come promptly, they would have been entitled to the relief given by the decree appealed against. (Emphasis added.)

Lord Blackburn went on to state at pp 1268 and 1269 as follows:

I proceed to consider the first of these questions. Throughout the Companies Act 1862 (25 & 26 Vict c 89), the word 'promoters' is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.

Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent ... I think, as already said, that the promoters are in a situation of confidence to some extent towards the company they form.

Where, as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendor's interest to get as high a price as possible, and they have a strong bias to overvalue the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

At pp 1272 and 1273 Lord Blackburn said:

... And as early as 5 September, six days only after the bargain was bound, subject to the approval of the Vice-Chancellor, and ten days before that approval, Westall began to take steps to form that company.

...

Mr Westall proceeded to take all the legal steps for the formation of the company. He drew up the memorandum of association. He prepared a contract, the contract to be made between Evans (in whose name the contract with Chatteris had been made) and one Pavy, for the sale to Pavy of this property for £110,000, subject to the new company, then in process of formation, being duly formed and completed. And by a memorandum, signed after it was formed, Pavy declared himself to have signed as agent for that company. Pavy was a nominee of the syndicate, who certainly could

give no independent protection to the interests of that company. But it was never pretended that he would do so, or could do so. He had no more to do with the substance of the matter than the releasee to uses has to do with the substance of the conveyance. His name was used as a part of the machinery by means of which, under the powers in the articles of association, the property of the promoters was to be transferred to the company for £110,000. Other machinery might have been adopted to effectuate this, but if sufficient steps had been taken otherwise to protect the interest of the company, I do not see that any complaint could justly have been made of the adoption of this machinery.

The memorandum of association was signed by John Marsh Evans and six other persons, all of whom it was admitted were mere nominees of the syndicate, and none of them was in a condition to afford disinterested protection to the interests of the company.

Mr Westall also prepared the articles of association for the company. Two of the articles were important, namely:

> (65) The number of directors shall from time to time be determined by the company in general meeting; until any other number is so determined there shall not be less than four directors nor more than seven. The first directors shall be, his Excellency Monsieur Drouyn de Lhuys, EB Eastwick, Esq, the Right Honourable Thomas Dakin, John Marsh Evans, Esq, and Rear-Admiral R John Macdonald.

Of those five persons thus named as the first directors, one, Mr Evans, was from his position incapable of affording the company disinterested protection. In my mind, the real question here is whether the other four, or any of them, were persons so situated that they could form an unbiased judgment for the company, and, if they were, whether the promoters had given them such information, and so acted towards them, as to be entitled to act on the belief that they had exercised that unbiased judgment.

At p 1275, Lord Blackburn said:

> ... and I think if Mr Westall had been acting for a purchaser he would probably have tested this more closely than he did. But more than this I think was not proved.

How, then, stands the case as to the five persons named as the first directors? M de Lhuys was requested by Erlanger to act as a director, and he assented. It is not pretended that he made, or was expected to make, any independent inquiry on behalf of the company. He was asked to be a director because, from his position, he would be influential in promoting the sale of phosphate on the continent; and he assented, trusting entirely to Baron Erlanger. I see no harm in this on either side, but it afforded no protection to the company.

At p 1276 he said:

> I think this is quite enough to show that there could be no protection afforded to the company by any independent inquiry on the part of Eastwick.

As to Admiral Macdonald, I do not suppose he would have lent himself to anything he thought wrong, but he evidently came into the company with a foregone conclusion that everything his friend Erlanger had done was

> right. I do not say that this was not a bona fide belief on his part, but he came in under such circumstances that he could not be expected to make any independent inquiry; and if he had made one, it would have required very great moral courage in him under such circumstances to say that anything done by Erlanger, was wrong. Under such a bias he could afford no protection to the company.
>
> Evans was the agent of the syndicate. The company could not therefore, have any protection unless from Sir Thomas Dakin. He was, or had recently been, Lord Mayor. He was quite disinterested, and he embarked his own money in the company; and he certainly ought before lending his name as a director to have made some inquiry, especially as it is impossible to suppose he was not aware that those getting up the company were the vendors of the lease. The evidence as regards him is in such a state as to give me much embarrassment.

From the passages quoted above, the position may be briefly summarized as follows: the syndicate, as promoters of the company stood in a fiduciary position. It was incumbent upon them to inform the board of directors of the company that the company was buying the property of the promoters. The board of directors was the competent judge to decide whether or not to buy the property. The purchaser of the property must be in a position to exercise an intelligent judgment on the transaction. The promoters were in a situation of confidence towards the company, and therefore they cannot act in such a way that as a result it afforded no protection to the company. The bargain between the promoters and the company could not stand unless more was done for the purpose of protecting the interests of the company. In *Erlanger,* the directors of the company were named by the syndicate. They were the friends of Erlanger and they were not expected to make independent enquiry. There was bias on the part of the promoters, and accordingly, there was no protection afforded to the company.

Mr RS Nathan, who is also counsel for the defendants says that he is not challenging the principles laid down in *Erlanger.* He argues, however, that in the case of a club, the promoters have no fiduciary relationship with the members of the club they seek to promote.

Raja Aziz, however submits that the fiduciary duty arises when the relationship between the parties to a contract is of a confidential or fiduciary nature. He refers to 1 *Chitty on Contracts* (25th Ed) at p 234, where a fiduciary relationship is described as follows:

> The fiduciary or confidential relationship necessary to bring this doctrine into operation extends to certain obvious ties, such as those between trustee and *cestui que trust,* solicitor and client, and parent and child. But the courts have not fettered their jurisdiction by defining its limits, and are ready to interfere in order to protect the person who is under the influence of another. The principle was stated in *Tate v Williamson* (1866) 2 Ch App 55:
>
> > 'Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing

himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.'

He also cites *Swain & Anor v Law Society* [1981] 3 All ER 797; [1982] 1 WLR 17, when the English Court of Appeal decided ([1981] 3 All ER 797 at pp 798–799):

> It was a strict rule of equity that a person who owed a fiduciary relationship to another was accountable to that person for any profit or advantage derived from the relationship. The Law Society, by entering into the master policy arrangement with the insurers on behalf of all solicitors and with the object of holding the benefit of the insurers' obligations as trustee for individual solicitors, thereby established a fiduciary relationship between itself and individual solicitors, and since the opportunity to obtain commission was derived from the master policy arrangement the society had therefore obtained the commission by reason of its fiduciary position, notwithstanding that the contract between the society and the insurers was concluded before the fiduciary relationship arose or that the society had acted bona fide throughout. Furthermore, in agreeing to receive the commission the society had placed itself in a position where its duty as trustee arising out of the fiduciary relationship and its own interest in receiving commission might conflict. It followed that in principle the society was accountable to individual solicitors who paid premiums under the scheme for the commission received by it (see pp 805f–806b, p 809a–e, p 810a–f, p 814a–c, p 817d–f, p 819e–h, p 820h and p 822j to p 823c and j to p 824h, post); *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 applied.

Stephenson LJ, in his judgment ([1981] 3 All ER 797 at pp 806 and 807; [1981] 1 WLR 17 at p 28) said:

> I find some support for my opinion that a fiduciary relationship was established between the Law Society and the solicitors when it negotiated the original contract in the judgment of the Court of Appeal in *Re Reading's Petition of Right* [1949] 2 All ER 68, [1949] 2 KB 232 which was approved on appeal by every member of the House of Lords: *Reading v A-G* [1951] 1 All ER 617, [1951] AC 507. In giving the judgment of the Court of Appeal, Asquith LJ ([1949] 2 All ER 68 at p 70, [1949] 2 KB 232 at p 236) concluded from a consideration of the authorities that:
>
> > 'For the present purpose a "fiduciary relation" exists ... (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure the best terms available.'

Oliver LJ, in his judgment ([1981] 3 All ER 797 at p 817; [1981] 1 WLR 17 at p 41) said, 'What was held on trust therefore was the benefit of that engagement, and it is that trust and ... that trust alone which gave rise to any fiduciary relationship between the Law Society and the solicitors required to be insured...'.

Raja Aziz next refers to *Roche v Sherrington & Ors* [1982] 2 All ER 426; [1982] 1 WLR 599 where Slade J held ([1982] 1 WLR 599 at p 600):

> ... *there was no reason in principle why a special fiduciary relationship could not exist between a plaintiff and an unincorporated association,* and that the plaintiff

> had, on the basis of the facts pleaded, an arguable case that there existed between himself and the persons who were for the time being members of Opus Dei at the several dates of the relevant transactions the relevant fiduciary relationship that was necessary; but that since the statement of claim was formulated as a claim against all the present members of Opus Dei, may of whom were not members thereof at the relevant dates, and since it was not alleged that the present members either had benefited or were capable of benefiting from the relevant payments or that the first defendant had personally done anything wrong or benefited in any way, no reasonable cause of action was disclosed against him or the present members of Opus Dei, on whose behalf he was being sued (post, pp 607H–608E, G–609D). (Emphasis added.)

In his judgment ([1982] 2 All ER 426 at pp 432–33; [1982] 1 WLR 599 at p 608), Slade J said:

> ... In considering whether, as a matter of principle, a transaction between an individual and an unincorporated association may give rise to a presumption of undue influence on the part of the members of such association, I think it may be helpful to give a hypothetical example. A man might entrust the management of his assets to a corporate merchant bank, in circumstances which made it plain that he was looking to the bank as a whole to safeguard his interests. He might do so without entering into a special personal relationship with any individual representatives of it. Subsequently, during the continuance of this arrangement he might enter into a particular transaction with that bank dealing with one of those assets but without receiving independent advice. It could be that this transaction conferred substantial benefits on the bank but had not, on the facts, been induced by any particular representative of it. On such hypothetical facts, I see no reason in principle why the court should not hold that there existed a special fiduciary relationship between bank and customer, which placed on the bank the onus to justify the transaction. If this be right, I think it must at least be arguable that the relevant relationship could have existed, even if the bank were an unincorporated association. Accordingly, the first defendant has not satisfied me that the plaintiff's case must inevitably fail on this particular point.

From the authorities cited by Raja Aziz, it can be concluded that a fiduciary relationship does not exist only in relation to a company. Such a relationship also exists between two persons, such as when A entrusts to B the negotiation of a contract on A's behalf or for A's benefit and relies on B to procure for A the best terms available. Fiduciary relationships also exist between solicitor and client and between bank and customer, and in *Roche v Sherington & Ors*, between the plaintiff and an uncorporated association. In the circumstances, I am satisfied that there is a fiduciary relationship between the promoters of the Club and the Club and/or the members of the Club. In my opinion, *Erlanger* applies to the present case.

It is now necessary to consider who the promoters of the Club are. In para 2 of the amended statement of claim, the plaintiffs state that the establishment of the Club was conceived and *promoted* by the first and second defendants in conjunction with a foreign incorporated company

known as 'Ayala International Finance Ltd'. Paragraph 11 of the amended statement of claim alleges that the first, second, third and fourth defendants were in breach of their fiduciary duty. Paragraph 12 of the amended statement of claim alleges that all the defendants were in breach of their duty of care, skill and diligence in the acquisition of the shares in question. In prayer (1) of the amended statement of claim, the plaintiffs claim as against the first, second, third and fourth defendants damages for breach of fiduciary duty. In prayer (2), they claim for damages for breach of duty to exercise due care, skill and diligence against *all the defendants*.

In his written submission at p 2 para B(3), Raja Aziz raises the question 'whether the defendants were in a fiduciary relationship with members of the club'. At p 15, under the heading 'Summary', he states, '... the defendents as members of the protem committee of the Club were *promoters* of the Club'. (Emphasis added.)

At p 20, he states, 'On the evidence before the court, it is *submitted* that the defendants had been in breach of their fiduciary duty.'

In his oral submission at p 603 of the notes of evidence, he refers to the third issue, namely, 'Whether the defendants were in a fiduciary relationship with the members of the Club'. At p 672 of the notes of evidence, he says, 'It is submitted that on issue (3) the defendants were in a fiduciary relationship with the members of the Club ...'. At p 676, he states, '... the first and second defendants and the other defendants (as the other promoters of the Club) had failed in their duty, and the Club was not put in a position of forming an intelligent and independant judgment with regard to the purchase of shares ... It was their duty to conduct themselves [in a way] which would not breach that fiduciary duty ...'.

Raja Aziz's submission gives me the impression that he is saying that all the defendants are the promoters of the Club, and therefore in a fiduciary relationship with the Club.

Mr Cecil Abraham, in his written submission at p 63 does not appear to dispute that the nine defendants are the promoters of the Club. He says:

> The nine defendants were the original protem committee members. They were what may be termed loosely the 'promoters' of the Club in the sense that they were, together with two others, Junaidah and Angeline Low, the 'initial' founder members of the Club.

I think Mr Cecil Abraham uses the term promoters 'loosely', because in his submission he is contending that whilst promoters of a company are in a fiduciary relationship with the company, promoters of a Club do not have such relationship. He explains, 'Whilst what authority there is relates to promoters of companies, there is no authority which clothes the founder members of a club with the status of fiduciary...'.

I have earlier expressed my opinion on the law that the promoters of the Club are in a fiduciary relationship with the Club. In my view, Mr Cecil Abraham does not appear to dispute the fact that the nine defendants are the promoters of the Club, subject to the qualification that they are not in a fiduciary relationship with the Club.

After considering the submissions of both Raja Aziz and Mr Cecil Abraham on the question of who are the promoters of the Club, it is neccesary for me to consider the facts in the present case because the question of whether a person is or is not a promoter is a question of fact to be decided by the court.

The concept of the Club was first introduced by the Ayala Group of the Philippines, when it first started operation in Malaysia in 1978. Tengku Abdullah and Gen Yusoff were closely associated with the Ayala Group and they, together with the Ayala Group, mooted the idea of the Club. The Club was to be built on a piece of land owned by Raintree Development. The original owners of Raintree Development were Peter Yeoh, Tan Chin Yong, Low Nyap Heng and a few others. There were 1.5m shares. In 1979, the shares in Raintree Development were acquired by Tengku Abdullah (412,501 shares), Gen Yusoff (487,500 shares), and Ramon Madrid (300,000 shares). Raintree Development was acquired on a joint venture basis. The fourth defendant, Yeoh Chong Swee was appointed by Tengku Abdullah and Gen Yusoff as the director of the company on 1 June 1979, but he was not a shareholder. Tengku Abdullah and Gen Yusoff, became its directors on 17 August 1979. By the end of 1979, the majority shareholders of Raintree Development were Tengku Abdullah and Gen Yusoff. The original idea was to issue a prospectus and shares in Raintree Development, and offer them for sale to the public. An application was made to the Foreign Investment Committee ('the FIC') but the application was not approved. The FIC indicated that the Club was be registered under the Act.

Allied Capital was incorporated on 20 May 1980. It was a shell company. The company was acquired to be the developer of the Club. The shareholders of Allied Capital are Tengku Abdullah, Gen Yusoff, Jose, Ramon and Low Nyap Heng. The majority shareholders are Tengku Abdullah and Gen Yusoff. Yeoh Chong Swee was appointed director of Allied Capital by Tengku Abdullah and Gen Yusoff. He is not a shareholder. On 29 January 1981, Raintree Development sold part of its land to a company known as Cosmopleks. The company was set up by the joint venture partners to acquire the land for condominium development. It was incorporated in 1981. Tengku Abdullah and Gen Yusoff were the only shareholders of Cosmopleks. The directors were Tengku Abdullah, Gen Yusoff, Low Nyap Heng and Yeoh Chong Swee. By December 1982, there were other shareholders of Cosmopleks.

The meeting to form the Club was first held on 20 October 1981. It was attended by 12 persons, including all the defendants. The meeting appointed a protem committee to take the necessary steps to obtain registration of the Club. Paragraph 3 of the minutes of the meeting is reproduced below:

> Appointment of a protem committee
>
> The meeting then elected a protem committee to take the necessary steps to obtain registration of the proposed club in accordance with the laws of Malaysia. The following were unanimously elected to the offices indicated:

Chairman	:	YM Tunku Abdullah ibni Al-Marhum Sultan Abu Bakar
Vice-Chairman	:	Brig Gen Yusoff Abu Bakar (Rtd)
Secretary	:	Encik John Low Nyap Heng
Assistant Secretary	:	Cik Elizabeth Goon Pek Chin
Treasurer	:	Tham Wai Hoong
Committee	:	Encik Yeoh Chong Swee Encik Abdul Kadir Hj Md Kassim YM Tengku Azlan ibni Al-Marhum Sultan Abu Bakar Lt Col Zarazilah Mohd Ali (Rtd) Encik Clifford Tan Chwee Siang

In my opinion, the members of the protem committee listed above were the promoters of the Club. The tasks of the protem committee were: (1) to obtain registration of the Club under the Act; and (2) to seek the approval of the Registrar of Societies to operate the Club pending its registration. All the nine defendants were in the protem committee, and they were therefore the promoters of the Club. I think this point is not in dispute. Both Raja Aziz and Mr Cecil Abraham have submitted that the defendants who sat in the protem committee were the promoters of the Club. Since all the defendants were the promoters of the Club, they are therefore in a fiduciary relationship with the Club.

The next question to consider is whether there has been a breach of the fiduciary relationship.

The sale and purchase agreement dated 24 August 1982 was entered into between Allied Capital on the one part, and Tengku Abdullah and Gen Yusoff who signed on behalf of the members of the Club on the other part. I have carefully examined the signature of the director who signed the agreement on behalf of Allied Capital, and I am satisfied that it is the signature of Yeoh Chong Swee, who was also at the material time a member of the protem committee of the Club (see his signatures in AB2 at pp 8, 36, 38, 42 and 45.) In his evidence at p 340, Yeoh Chong Swee admits that he was appointed director of Allied Capital in 1981. The person who signed as secretary of Allied Capital is Low Nyap Heng, who was also a member of the protem committee of the Club. His signature in the agreement is similar to that found in AB2 at pp 8, 40 and 45. With regard to Tengku Abdullah and Gen Yusoff, it is clear that they are the major shareholders of Allied Capital. In my opinion, these four persons are in effect the vendors, as well as the purchasers and promoters of the Club. The situation is similar to that in *Erlanger* where Jessel MR in his judgment in the Court of Appeal (1877) 5 Ch D 103 said, 'This action ... is by a company against certain persons who were the promoters of that company and who were the vendors to the company of a lease of the island *Sombrero* ...'. It is true that prior to the signing of the agreement, the four persons declared their interest in Allied Capital at the meeting of the protem committee of the Club held on 3 June 1982 (see AB2 at p 20). But the other members present, namely, Leonard Tham, Tengku Azlan, Abdul Kadir Kassim, Lt Col Zarazillah and Clifford Tan proceeded on with the meeting and passed the following resolution:

That the president and vice-president be and are hereby authorized to enter into the sale and purchase agreement with Allied Capital Sdn Bhd for the purchase from the same the entire issued and paid-up capital of Raintree Developments Bhd for a total consideration of RM47,000,000 upon the terms and conditions set out in the said agreement (a copy of which is attached herewith).

Although the four persons have declared their interest in Allied Capital, they, as promoters of the Club, cannot run away from their fiduciary duty to the Club.

Tengku Abdullah and Gen Yusoff who are the first and second defendants in the first suit, respectively, are the principal figures in this case. They are the controlling shareholders and directors of Allied Capital, Raintree Development and Cosmopleks.

Yeoh Chong Swee (the fourth defendant) is a director of Allied Capital, Raintree Development and Cosmopleks. He is a consultant of Allied Capital. In the protem committee, he advised members on the sale and purchase agreement and how the purchase price of RM47m was arrived at. He signed the agreement on behalf of Allied Capital.

Low Nyap Heng (the third defendant) is the consultant who was responsible for setting up the Club. He is in Cosmopleks. He is also a shareholder of Allied Capital. He is also a member of the protem committee. He signed the agreement as secretary of Allied Capital. Leonard Tham (the fifth defendant), and Clifford Tan (the eighth defendant) are employees of Allied Capital. Leonard Tham is also the financial manager of AF Holdings Sdn Bhd. Both of them are members of the protem committee.

Abdul Kadir Kassim (the seventh defendant) is one of the shareholders of Cosmopleks. He was acquainted with Mr Reyes of the Ayala Group and he was brought in to help out with the project. He is the legal adviser of the Ayala Group and he drafted the memorandum of understanding. He was involved with the Club project right from the beginning. He is also a member of the protem committee.

Tengku Azlan (the sixth defendant) is a director of Raintree Development. He is also a member of the protem committee.

Lt Col Zarazillah (the ninth defendant) was appointed to the protem committee by Tengku Abdullah and Gen Yusoff. He is an employee of Apera Sdn Bhd which is a company owned by Tengku Abdullah and Gen Yusoff.

In my opinion, each of the defendants has an interest either as shareholder, director, or employee of the companies owned by Tengku Abdullah and Gen Yusoff, or the Ayala Group. When the protem committee passed the resolution on 3 June 1982 to purchase the shares in Raintree Development for RM47m, all the defendants were not in a position to act impartially. There was no *independent* and intelligent judgment on the transaction to purchase the said shares. As promoters of the Club, they were in a situation of confidence. I find that they were not in a position to give disinterested protection to the Club. Indeed nothing was done for the

purpose of protecting the interests of the Club. The promoters failed to conduct an independant enquiry on the price of the shares. I find that there was bias on the part of the promoters and in the circumstances, no protection was afforded to the Club.

On 24 August 1982, when the purchase of the Raintree Development shares was executed, there were 457 individuals and 96 corporations who had been approved as provisional members of the Club. These provisional members were not invited to consider the agreement dated 24 August 1982, on the ground that they were not members at that point of time. The defendants referred to them as applicants. These 'applicants' had paid their entrance fees fully or partially. In his evidence at p 317 of the notes of evidence, DW4 said:

> Q: On 24 August 1982, is that correct there were other persons who had applied to join the club?
>
> A: Yes, it is correct there were other applicant candidates for membership who were existing at that point of time.
>
> Q: There were candidates at that time?
>
> A: Yes.
>
> Q: Were the candidates invited to consider the sale and purchase agreement dated 24 August 1982?
>
> A: They were not invited because they were not members at that point of time.

Raja Aziz said that the defendants knew that the provisional members and subsequent members would bear the liability to pay the purchase price. Instead, the defendants decided for themselves that the Club should purchase the said shares at a price which the defendants themselves determined. He said that by doing so, the Club was left with no protection. He contends that the defendants were biased in the whole transaction and the situation is therefore similar to that in *Erlanger*. See Lord Blackburn's speech at (1878) 3 App Cas 1218 at pp 1272, 1275 and 1276. From the evidence, I find that when the defendants say that RM47m is a fair price for the shares, they are in fact looking at it from the point of view of the vendor, Allied Capital. DW4 was trying to get as much as possible for Allied Capital. He had no interest of the Club in mind. The attitude of the defendants was that they would decide the price. The others had to accept that price. In his evidence at pp 319–323 of the notes of evidence, DW4 said:

> Q: The price of RM47m, can you tell us in your own words how this figure of RM47m was arrived at as the consideration for the purchase of the shares in RDB? When was the offer to sell the whole club with the facilities made to the protem general committee by the joint venture company as managed by Ayala Group to the Club?
>
> A: Agreeing to purchase the club for RM47m, we took into account a number of factors, namely, that the club was at that time the only club that was for the purchase of membership designed as a sports and recreation club as opposed to the old buildings. It was purposely built for sports and recreation and it was the only club after Independence

that was available to any interested parties. There were no other clubs in development at that point of time. The concept was proposed and developed by the Ayala Group from Phillipines, which was translated in Malaysia. It was a unique factor and it was the only club that could offer transferable membership. It also offered members ownership of the club, unlike the other clubs today which only offer you to use the facilities. We also took into account that the whole project was being financed by the developer. We were allowed to pay the RM47m over 4½ years without interest and under easy or deferred payment scheme and no security was required, and the transaction that was out of the ordinary because in the normal sale and purchase, we have to pay the whole amount within three to six months, or upon completion and hand over of the project. We also took into account the fact that this project is very high risk because as the promoter of the club, we, the protem general committee, did try to approach the financial institution whether they would finance the development of the club or the acquisition. Since it has never happened before that promoter or businessman would rely solely on the sale of membership to pay, such financial institution were not ready to consider. Therefore, taking into account all the factors, the uniqueness, the size, the easy payment terms and the risk involved of the project, we felt RM47m was a fair price.

Q: What about the fact, what is the impression of the shares, whether easily transferable and the fact the club at that point of time constituted two to three members?

A: In arriving at the RM47m, we considered the net tangible assets of the club. For us, the net tangible assets would have to be considered. We also took into account that the club has the capacity to accommodate 3,000–4,000 members. From that 3,000–4,000 members, the club had a potential of getting RM100m membership fees, at an average price of RM25,000 from each member. Having considered the potential, RM47m was a fair price.

Q: The plaintiffs in this matter had alleged that you should have obtained a valuation of the shares of Raintree Development on 24 August 1982, before entering into the transaction, can you tell us what is your view on this?

A: The general committee was fully aware. When we first promoted a club, we have been promoting the sale of shares of RDB. We were well informed by the project managers that the project will cost an amount of money and the risk involved and the various other factors, so we felt we are all informed buyers. We all had a common goal were involved in the development and very involved in the committee, so we were all fully aware. We had access to the information. We, meaning the project managers and the developers, were fully aware of what we were entering into. At that point of time, the 11 members present and all the members were fully aware of the development and concept of the club, therefore there was no need to have the expenses of appointing a professional or merchant bank or valuers to determine the value.

Q: The plaintiffs also said that in arriving at the figure of RM47m and in order to apply for the shares in RDB, you and the other committee member failed to make proper enquiry for the purpose of protecting of the Club in relation to the acquisition of the shares?

A: To me, the Club at that point of time had 11 members who were admitted as members. After that, they obtained the temporary certificate to operate. The temporary certificate had certain conditions which did not make it to consider to admit any other members, and to us the protem committee, that is the general committee, the members were 11 at that point of time and they were fully aware of the situation having participated one way or the other with the project because they were informed and we thought there was no further need to go through any other formalities.

Q: You were a committee member, did you on 24 August 1982, when the agreement was signed and prior to that the approval of the committee and the extraordinary general meeting ('the EGM') was given, did you as the committee member have before you all the relevant information to make you all an informed buyer?

A: Definitely. As a director of the land owning company and director of the developing committee, all the committee members were very well informed of the situation.

Q: It is also a suggestion that what the plaintiffs are suggesting is that the promoters were making perhaps excessive profit and condition to RM47m?

A: As far as we are concerned, as I mentioned earlier, the reason that we agreed to the RM47m is without regard to what to be the profit to the developers, and as we were informed buyers, we were concerned with what the Club would be to us, not what it is going to cost the developer; in normal transaction one would not know what is the cost of the developer or whether it is something. We have to look at the potential, what is the value of the particular thing. Various factors are enumerated and I feel RM47m is a fair price irrespective of what the developer makes. RM47m under the sale and purchase agreement is fair and reasonable.

Q: Do you feel that you have in any way cheated the members of the Club who were in sideline to be full members?

A: Definitely not.

Q: Have you personally made any profit by agreeing on this 24 August 1982 transaction?

A: I have no interest in the company or owned the company, I was there as a professional adviser for my client. I don't have any equity in the company that carried out the project, neither do I have any interest.

Under re-examination, DW4 admitted that he was in fact acting more in his capacity as director of Allied Capital and Raintree Development (see p 379 of the notes of evidence). The evidence also shows that the protem committee decided that the sale and purchase agreement in respect of the shares be approved and sent to the EGM. The same people were present at the EGM except for Miss Elizabeth Goon. The defendants therefore ignored the interest of the Club they sought to promote.

The plaintiffs are contending that the defendants were only interested in securing a purchase price of RM47m which had been predetermined by the defendants. The figure was prepared by DW5, one of the defendants. DW5 was an employee of AF Capital. He admitted that he started with the

figure of RM47m, which was the figure Allied Capital wanted. He started working on the figure with a rough estimate. Another defence witness, DW1 is an accountant. He was asked to ascertain the fair value of the entire issued and paid-up capital of Raintree Development. He said that the price of RM47m was a reasonable price. According to him, the net tangible assets can also be a fair value. On DW1's evidence, Raja Aziz says:

> One glaring defect in D18 related to the so-called 'financed charges' which Allied Capital incurred from its borrowings and which it passed to RDB. This was obviously totally indefensible since legally RDB had paid for the whole of the contract price of RM19m in advance. In spite of the audited accounts clearly showing this, DW1 refused to accept it and insisted that the interest was payable by RDB. He contended that the cheque for RM19m given by ALC to RDB in payment of the RM19m RDB shares allotted to it, and the cheque for the same amount delivered almost immediately by RDB to ALC in payment of the contract sum, constituted merely an exchange of cheques with no money passing. He therefore still maintained that RDB was still obliged to reimburse ALC for the interest it had to incur from the RM19m it had to raise to finance the construction of the club house. This was a surprising attitude taken by an expert accountant. His view was, in fact, not accepted even by DW4.

DW6, another expert witness called by the defence, disagreed with DW1. In his evidence at p 581, DW6 said:

> Q: I want you to look from the accountant's point of view. Allied Capital had been paid in full for the contract price in 1981 in advance. It did not have the money because this was just an exchange of cheques earlier, you understand?
>
> A: Yes.
>
> Q: That is what they called cross cheques, there is no money, but they have been paid in full. Now they wanted to borrow money to do this works. So, they borrowed money. From the accountant's point of view, would the financial charges incurred in respect of that borrowing by ALC be the responsibility of RDB?
>
> A: For the RM19m?
>
> Q: For the RM19m.
>
> A: Should not be.

After considering all the relevant evidence in civil suit No 204 of 1986, I am satisfied that the defendants have been in breach of their fiduciary duty to the Club. It is to be noted that the situation in the present case is similar to that in *Erlanger* case. Although it is my finding that all the defendants are in breach of the fiduciary duty to the Club, I am bound by the pleading and my decision on this issue is to grant an order in terms witness of prayer (1) of the amended statement of claim.

Since there is a fiduciary relationship between the defendants, the Club and its members, and since there has been a breach of that relationship, the rights of the members of the Club are affected. It is not only those who were 'members' at the time the agreement was signed who are liable to pay the purchase price. All members of the Club including present members are liable to pay the purchase price.

A In my opinion, the plaintiffs are entitled to bring a representative action under O 15 r 12 of the RHC. The plaintiffs are suing on behalf of themselves and all the other members of the Club except the defendants. All the persons who are represented by the plaintiffs (not including the defendants) have the same common interest in bringing the action. Because of the breach in fiduciary relationship they are liable to pay the purchase B price of the Raintree Development shares. In *Roche v Sherrington & Ors* [1982] 2 All ER 426 at p 434; [1982] 1 WLR 599 at p 610, Slade J said in his judgment:

> If the plaintiff wishes to involve RSC O 15 r 12 for the purpose of bringing an action against named defendants as representatives of a wider class, one C essential condition is that the persons represented should have the same common interest in defending the proceedings in question ...

I agree with the above passage, and in my view the plaintiffs have satisfied the essential condition in the circumstances of the the present case.

There remains one more point to be considered, namely, the plaintiffs' D allegation that the defendants had failed to exercise due care, skill and diligence. As stated, the defendants were in breach of their fiduciary duty to the Club. As promoters of the Club, they failed to get an intelligent and independant report as to the value of the shares. They also failed to get independant advice. They were only concerned in promoting their own E interests and there was bias on their part. It is, therefore, my finding that all the defendants, as promoters of the Club had failed to exercise due care, skill and diligence in the exercise of their duty in promoting the Club.

After considering all the evidence and the circumstances in civil suit No 204 of 1986, I am of the view that the plaintiffs should succeed in their F claim.

I next turn to civil suit No 1084 of 1986. The main issue raised by the defendant in that suit is the question of undue influence. It is contended by Mr Anantham, counsel for the plaintiff in that suit, that the plaintiff is not guilty of undue influence. He cites the House of Lords decision in *National Westminster Bank v Morgan* [1985] 1 All ER 821; [1985] 2 WLR G 588, where it was held that a transaction could not be set aside on the grounds of undue influence, unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence. Mr Anantham submits that if the defendant is alleging undue influence, then he must ask the court to rescind the agreement. This, he H says the defendant has not done. In his written submission at pp 29 and 30, Mr Anantham states:

> The nature of the relief prayed for by the defendants in their counterclaim in seeking not a rescission of the agreement as is expected of them under the law, speaks volumes about whether the defendants were induced to enter into the agreement of 24 August 1982. What the defendants seek in their I counterclaim is not the rescission of the agreement but a substitution of some of the terms of the agreement by new terms, more favourable to them. More precisely, the defendants want to be allowed to retain the Club and all the benefits received by them pursuant to the agreement of 24 August 1982, but at the reduced price of RM24m and that they be compensated for the

moneys paid by them in excess of this amount. This conduct on the part of the defendants affords ample evidence that the defendants are not complaining about undue influence being exerted by the plaintiff to enter into the agreement but merely that the price is excessive.

In his opening address, Mr Anantham said that the plaintiff was quite happy to rescind the agreement, get back the Club and land, and 'give back their money'. He submits that the figure of RM47m is the correct figure.

Raja Aziz refers to s 16(1) and (2) of the Contracts Act 1950 which states:

(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or *where he stands in a fiduciary relation to the other*; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (Emphasis added.)

He submits that the principle of undue influence includes a situation where one party dominating the other is in a fiduciary relationship. He refers to *Lloyds Bank v Bundy* [1975] 1 QB 326 at p 338; [1974] 3 All ER 757 at p 764; [1974] 3 WLR 501 at pp 507–508. Lord Denning MR said in his judgment:

> The third category is that of 'undue influence' usually so called. These are divided into two classes as stated by Cotton LJ in *Allcard v Skinner* (1887) 36 Ch D 145 at p 171; [1886–90] All ER Rep 90 at p 93. The first are those where the stronger has been guilty of some fraud or wrongful act — expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford LC in *Tate v Williamson* (1866) 2 Ch App 55 at p 61.

Lord Denning said as follows [1975] 1 QB 326 at p 339; [1974] 3 All ER 757 at p 765; [1974] 3 WLR 501 at pp 508–509:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining

power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points.

In *Tate v Williamson* (1866) 2 Ch App 55 , Lord Chelmsford LC said at pp 60 and 61:

> The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

On the question of why his client is not asking the court to rescind the agreement, Raja Aziz says (at p 611 of the notes of evidence) that there is no question of the plaintiffs' being able to claim to rescind the agreement in their action against the defendants for breach of fiduciary duty. He says that the defendants were not the vendors of the Raintree Development shares. The owners of the shares were Allied Capital. He contends that the plaintiffs' only remedy against the defendants is for compensation for the loss they have suffered as a result of the defendants' breach of duty.

At p 612 of the notes of evidence, Raja Aziz states:

> If your Lordship finds that there has been breach of fiduciary duty in so far as the individual defendant is concerned, that is in C/S 204/86 they would have brought about upon the plaintiff the loss in the sense that we have to pay RM47m for a property which is less than that and therefore the difference must be compensated to the plaintiff.

Raja Aziz goes on to say at pp 616, 617 and 618:

> The point I think my learned friend is making is this, that if we really say that there was undue influence, then we say the contract was void, and then we should be prepared to give back the property and they should pay us. It is in the argument influence in the ordinary sense, that there was representation made and therefore there was influence and we found there

was misrepresentation and avoided that contract. This is not that type of case. This is the type of case which follows the relationship from the vendor to the buyer where the vendor is represented in that protem committee. They were the same people. ALC has the first and second defendants. They were interested in the outcome of the sale to the extent they want to make as much money as possible. They were there with all their appointees in the protem committee. They were there to purchase property from ALC which they themselves were owners of the shares. In that context, there was this dominating influence which ALC would bear on the purchasers in the sense that ALC would be dictating to the purchasers in the sense of their alter ego, which are the first and second defendants. It is to the extent they were acting for the Club, the first and second defendants and the other defendants were actually not able to exercise a free mind. They were more concerned with making as much money as possible for ALC because they stood to gain as shareholders. As for the question of rescission, it has never been the intention of the plaintiff to rescind. There has been no election made. We wanted to take on the contract. The contract was completed. It was an executed contract but we say that because of the breach of fiduciary duty on the part of the individual defendant, the protem committee members and because of the undue influence exercised by the seller, ALC, to this protem committee in the guise of the alter ego of ALC, that we had a loss because of the excessive purchase price, and it is that which we are trying to recover. There has never been an election that we indicated, we wanted the property back. The argument is this, because the property is worth something double the price, maybe RM90m, let's assume that is the position. Where does that put us? Does it mean that because it is now worth more than RM47m, let's say RM100m, does it mean it is right for these people who were acting in a fiduciary capacity to have sold the property to the Club at an inflated price? That is the question. The point is not the value now. The point your Lordship has to consider is the value at the time of the signing, ie what we should pay for the shares. The way it is being argued is this, you have got what you bargained for. That is not the issue. The issue was if there was a breach of fiduciary duty then did they perform their duty properly? They couldn't have, because there was a breach, but this would be that they have taken care in saying that the value was in fact RM47m. They have independant advice. As Roger Yue said, we are looking at RM47m. We work backwards. We add this as charges and finally we come to this nice figure which we wanted in the first place. I don't think we want it this way. Your Lordship will see from the rest of p 22 of the submission until the bottom of the first paragraph, that I suggested the proper way to compute the loss would be the difference of what should have been the fair value and the actual price we paid. We paid RM47m. Of course, we only paid RM41m, but the contract price was RM47m. If your Lordship comes to a conclusion that it is less than RM41m, that is what we should have paid, anything in excess of that should be refunded to us. The fair value of the nett tangible assets have been worked out by Thomas Scott, PW2, to be at around RM24m based on the figures in the audited accounts of Kassim & Chan, and also on the valuation of Messrs Jones, Lang & Wootton. That would be the fair value, and that was accepted by Roger Yue himself. What is the fair price? Now again, he has agreed that the fair price would take into account not just the fair value but certain other things and in this aspect of the case, I think there is suggestion made by the defendant that we must take into account the uniqueness of the Club. If one reads all these nebulous

theory of what is uniqueness in a property, it must be eventually what should the property be. I think your Lordship would like to come to a percentage. They have suggested that the reasonable margin of profit would be 40%.

In support of his contention that Allied Capital should pay back the difference, Raja Aziz cites the Federal Court decision in *Mahesan v Malaysian Government* [1975] 1 MLJ 77. That case deals with the issue of principal and agent where the agent accepted bribes and induced the principal to enter into a contract with the person who had paid the bribe. The Federal Court decided that the principal was entitled to recover from the agent the bribe money and compensation for loss. The court ordered the agent to pay the principal compensation in the sums of RM488,000 less RM45,000 equal RM443,000 with interest. Mahesan appealed to the Privy Council but his appeal was dismissed: see [1978] 1 MLJ 149. In its judgment, the Federal Court expressed the view that an agent of a co-operative society is in a similar position as directors of a company and the duty of such agent is of a fiduciary nature. At p 80 of its judgment, the Federal Court said:

> Now as to the law, it is my view that the society, being registered under the Co-operative Societies Ordinance No 33 of 1948, is a body corporate (s 8 of the Ordinance) and that the appellant being its director and honorary secretary was its agent.
>
> In *Ferguson v Wilson* (1866) LR 2 Ch 77, Cairns LC said at p 89:
>
> 'What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agents.'
>
> The duties of an agent of a corporate body were stated in general terms by Lord Cranworth LC at p 471 in *Aberdeen Railway Co v Balikie Brothers* (1854) 1 Macq 461, in the following words:
>
> '*A corporate body can only act by agents, and it is of course the duty of those agents as to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal.* And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.' (Emphasis added.)
>
> More specifically, the law is that where an agent who has been bribed so to do, induces his principal to enter into a contract with a person who has paid the bribe, and the contract is disadvantageous to the principal, the principal may recover from the agent the amount of the bribe which he has received.

In the present case, the Raintree Development shares were purchased by the defendants for RM47m. The sale and purchase agreement dated 24 August 1982 was signed by Tengku Abdullah and GenYusoff on behalf of the Club. I have made a finding that the defendants as promoters of the

Club were in a fiduciary relationship with the Club. I have also made a finding that there has been a breach of fiduciary duty by the defendants. DW1, the accountant, confirmed the figure of RM47m. But I find that his evidence is unsatisfactory. His view on the interest was not accepted by DW4. The view was also not accepted by DW6. In the circumstances I find that DW1 is an unreliable witness, and his evidence cannot be accepted. PW2, the accountant who testified for the plaintiff, said that the entire value of the shares as at 24 August 1982 was RM25,718,000.

I find that PW2's evidence is more acceptable based on the reasons given by him in arriving at that figure. It is therefore my finding that the value of the shares as at 24 August 1982 was RM25,718,000. In the counterclaim, the defendant however states that the actual value of the shares purchased was RM24,597,160. The defendant claims that they have paid a sum of RM41,168,876 to the plaintiffs and therefore they are entitled to counterclaim the sum of RM16,571,734. In my opinion, judgment should be entered on the defendant's counterclaim for the sum of RM15,450,876 being the difference between RM41,168,876 and RM25,718,000.

For the reasons stated above, I make the following order:

(1) In respect of civil suit No 204 of 1986, I order that the plaintiffs be at liberty to enter judgment against the defendants as prayed in the statement of claim.

(2) The plaintiff's claim in civil suit No 1084 of 1986 is dismissed and I enter judgment on the defendant's counterclaim for the sum of RM15,450,876 pursuant to prayer (a), and the sum of RM556,752 pursuant to prayer (b), with interest thereon at the rate of 8%pa from date of judgment till date of realization and costs. The plaintiff's counterclaim is dismissed.

(3) Civil Suit No 96 of 1986 is to be heard on a date to be fixed.

Order accordingly.

Reported by Kevin Ooi